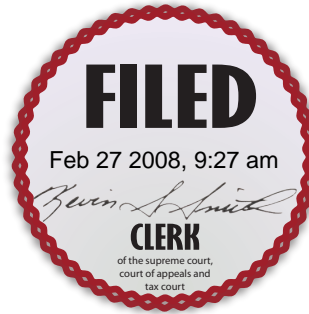


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**JUSTIN F. ROEBEL**  
Deputy Attorney General  
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**IN THE  
COURT OF APPEALS OF INDIANA**

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THOMAS AGUILAR,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 49A02-0704-CR-367

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Tanya Walton-Pratt, Judge  
Cause No. 49G01-0610-MR-164155

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**February 27, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Thomas Aguilar (“Aguilar”) was convicted in Marion Superior Court of murder, a felony, and Class A misdemeanor carrying a handgun without a license. He was ordered to serve an aggregate sentence of forty-five years. Aguilar appeals and argues that the State failed to rebut his claim of self-defense. We affirm.

### **Facts and Procedural History**

On August 30, 2006, Aguilar and his wife confronted their neighbor, Carlos Estrada (“Estrada”), because they believed that Estrada’s children were responsible for neighborhood graffiti. Aguilar and Estrada began yelling at each other and neighbors nearby became involved in the argument. Estrada’s neighbors, Michael May (“May”) and Carol Plummer (“Plummer”), began to argue with Aguilar because they did not believe that Estrada’s children had defaced property with graffiti.

Plummer accused Aguilar and his wife of being drunk and told them to go home. Aguilar responded that he was going to go get his gun. Tr. pp. 41, 101, 127. Plummer then went into her home and called the police while May remained outside. Aguilar returned to his home and retrieved his gun. He then returned to the alley near Estrada’s home where May was standing and shot him causing May’s death.

On September 1, 2006, Aguilar was charged with murder and Class A misdemeanor carrying a handgun without a license. A jury trial commenced on March 19, 2007. At trial, Aguilar’s wife testified that after the argument, Aguilar intended to return to speak with Estrada about painting over the graffiti. Tr. p. 163. She stated that as they approached Estrada’s home, May began to threaten them and walk towards them. Tr. pp. 164-66. She then testified that May was a couple of feet away from herself and

Aguilar, when Aguilar turned and started swinging the gun over his head. Tr. p. 167. She stated that Aguilar was only trying to strike May with the gun, but the gun went off. Tr. pp. 167, 175. In contrast, one of the Estrada children testified that Aguilar pointed the gun at May, who was standing in the alley smoking a cigarette, and shot him. Tr. p. 190.

Aguilar was found guilty as charged and sentenced to concurrent terms of forty-five years for murder and one year for carrying a handgun without a license. Aguilar now appeals. Additional facts will be provided as necessary.

### **Discussion and Decision**

Aguilar argues that the State failed to rebut his claim of self-defense. We review a challenge to the sufficiency of the evidence to rebut a claim of self-defense using the same standard as for any claim of insufficient evidence. Pinkston v. State, 821 N.E.2d 830, 841 (Ind. Ct. App. 2004), trans. denied. We neither reweigh the evidence nor judge the credibility of witnesses. Id. If sufficient evidence of probative value supports the jury's conclusion, we will not disturb the verdict. Id. at 841-42.

A valid claim of self-defense is legal justification for an otherwise criminal act. Birdsong v. State, 685 N.E.2d 42, 45 (Ind. 1997). The defense is defined in Indiana Code Section 35-41-3-2(a):

A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force. However, a person:

(1) is justified in using deadly force; and

(2) does not have a duty to retreat;

if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony. No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.

Ind. Code § 35-41-3-2 (2004 & Supp. 2007). Our supreme court recently held that the phrase “reasonably believes,” as used in section 35-41-3-2, “requires both subjective belief that force was necessary to prevent serious bodily injury, and that such actual belief was one that a reasonable person would have under the circumstances.” Littler v. State, 871 N.E.2d 276, 279 (Ind. 2007).

“When a defendant raises the claim of self-defense, he is required to show three facts: (1) he was in a place where he had a right to be; (2) he acted without fault; and (3) he had a reasonable fear of death or great bodily harm.” Wallace v. State, 725 N.E.2d 837, 840 (Ind. 2000). Once the defense is raised, “the State bears the burden of disproving at least one of these elements beyond a reasonable doubt for the defendant’s claim to fail.” Miller v. State, 720 N.E.2d 696, 700 (Ind.1999). “The State may meet this burden by rebutting the defense directly, by affirmatively showing the defendant did not act in self-defense, or by simply relying upon the sufficiency of its evidence in chief.” Id. Whether the State has met its burden is a question of fact for the factfinder. Id.

Aguilar argues that the State failed to rebut his claim of self-defense because 1) his wife testified that May provoked Aguilar by following them, verbally abusing them, and making “threatening movements towards the couple” and 2) Aguilar reasonably feared death or great bodily harm because May, a much younger man, was “behaving in an intimidating and threatening manner.” Br. of Appellant at 7-8.

Aguilar instigated an argument with his neighbors, and after threatening to do so, returned home and retrieved his gun. Estrada’s child, who witnessed the shooting, testified that May was smoking a cigarette as Aguilar approached. Aguilar then cocked

his gun, pointed it at May, and shot him. Tr. pp. 189-90. More than one witness testified that Aguilar's wife was not present at the time of the shooting or immediately thereafter. Tr. pp. 148, 200. Even if the jury had believed Aguilar's wife's testimony, there was no evidence of any specific threats May made to the Aguilars or that May threatened any physical violence. Moreover, May was not armed. Aguilar's argument is simply an invitation to our court to reweigh the evidence and the credibility of the witnesses, which we will not do. Accordingly, we conclude that the State presented sufficient evidence to rebut Aguilar's claim of self-defense.

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.